Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

OMI HOLDINGS, INC.,

Respondent/Cross-Petitioner,

v.

MANILDRA MILLING CORPORATION,

Petitioner/Cross-Respondent,

and JOHN THOMAS HONAN,

Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

BYRON L. GREGORY
227 W. Monroe St.
Chicago, Illinois 60606
(312) 372-2000
Counsel of Record

Of Counsel:

ROGER W. WENTHE
227 West Monroe St.
Chicago, IL 60606

MARK LEE HOGGE
555 13th St. NW
Washington, DC 20004-1109

PATRICK MCANANY
707 Minnesota Avenue
Kansas City, KS 66117

January 21, 1994

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a jury may overturn the decision of a federal agency, the Patent and Trademark Office, based on the same record reviewed by the agency, on a showing less stringent than is required by the Administrative Procedure Act.

2. Whether the Federal Circuit's decision, which permitted uncontested infringement to escape liability under the patent laws because it was infrequent, is contrary to the Court's precedent.

LIST OF PARTIES

OMI Holdings, Inc. ("OMI") adopts the first two paragraphs of the List of Parties in Manildra Milling Corporation's Petition for Writ of Certiorari and the clarification in OMI Holdings, Inc.'s Brief in Opposition to Petition for Writ of Certiorari.

John Thomas Honan is listed as a Cross-Respondent to this Cross-Petition because he was an adverse party in the portion of the district court and appellate court proceedings which are addressed by this Cross-Petition.

RULE 29.1 LIST OF PARENT COMPANIES

OMI Holdings, Inc. is a wholly owned subsidiary of a wholly owned subsidiary of John Labatt, Inc. OMI Holdings, Inc. has no subsidiaries.

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OPINIONS BELOW

OMI adopts the statement regarding the Opinions Below in the Petition for Writ of Certiorari filed by Manildra Milling Corporation ("Manildra"), No. 93-973.

STATEMENT OF JURISDICTION

OMI adopts the Statement of Jurisdiction in Manildra's Petition for Writ of Certiorari. OMI relies upon Supreme Court Rule 12.3 in filing this Cross-Petition. OMI received Manildra's Petition for Writ of Certiorari on December 23, 1993.

STATUTES INVOLVED

5 U.S.C. §706(2)

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

35 U.S.C. §271(a)

Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.

35 U.S.C. §282

A patent shall be presumed valid. Each claim of a patent (whether in independent, dependent, or multiple dependent form) shall be presumed valid independently of the validity of other claims; dependent or multiple dependent claims shall be presumed valid even though dependent upon an invalid claim. The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.

STATEMENT OF THE CASE

OMI adopts the first two paragraphs of the Statement of the Case in Manildra's Petition for Writ of Certiorari.

OMI presented a motion for judgment as a matter of law ("JMOL") on all claims at the close of all the evidence, which was denied. OMI renewed its motion for JMOL on all claims after the entry of judgment on the verdict, which was also denied. OMI appealed from this ruling. The Court of Appeals for the Federal Circuit affirmed the denial of OMI's motion for JMOL on the parties' claims regarding patent validity and patent infringement and reversed or vacated the denial of OMI's motion for JMOL on the remaining claims.

ARGUMENT

I. THE JURY WAS PERMITTED TO OVERTURN THE DETERMINATION OF A FEDERAL AGENCY ON A STANDARD LESS DEFERENTIAL THAN THAT MANDATED BY THE ADMINISTRATIVE PROCEDURE ACT.

The Patent and Trademark Office ("PTO"), a federal agency, is entitled to the same deference in its decisions as other federal agencies. Yet in the recurring situation, as presented here, where a jury considers the obviousness of an invention based on the same prior art reviewed by the PTO, the jury becomes a direct reviewer of the PTO's patentability decision. When the jury is permitted to exercise that role *de novo* without following the standards of the Administrative Procedure Act, 5 U.S.C. §551 *et seq.*

("APA"), as this jury was, the result is a violation of congressional intent that cannot be permitted to stand.

The Court expressed the policy of deference to the PTO's decisions in *Morgan v. Daniels*, 153 U.S. 120, 124-25 (1894), as follows:

> But this is something more than a mere appeal. It is an application to the court to set aside the action of one of the executive departments of the government. The one charged with the administration of the patent system had finished its investigations and made its determination with respect to the question of priority of invention. That determination gave to the defendant the exclusive rights of a patentee.
>
> * * *
>
> Upon principle and authority, therefore, it must be laid down as a rule that where the question decided in the Patent Office is one between contesting parties as to priority of invention, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which in character and amount carries thorough conviction.

In 1946, Congress enacted the APA, which expressly governs judicial review of final decisions of federal agencies. That statute applies an even stricter standard of review where the agency's decision is a mixed question of fact and law. In those situations, the agency's decision can be overturned only if its result is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). The Court's

decisions have underlined the stringency of this standard. *Motor Vehicle Manufacturers Association of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (under arbitrary and capricious standard, agency decision cannot be overturned if it is based on consideration of relevant factors and within scope of agency's delegated authority); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (arbitrary and capricious review standard is narrow, and court cannot substitute its judgment for agency's judgment).

The Court and lower courts have applied the APA's standards of review to a variety of final decisions by the PTO for which no express statutory method of review exists. *See, e.g., Kingsland v. Dorsey*, 338 U.S. 318 (1949) (reviewing PTO's disbarment of attorney); *Morganroth v. Quigg*, 885 F.2d 843 (Fed. Cir. 1989) (reviewing denial of request that PTO revive unintentionally abandoned application); *Smith v. Mossinghoff*, 671 F.2d 533, 538 (D.C. Cir. 1982) (same as *Morganroth*).

The decision by the PTO that a patent is valid, including its implicit conclusion that it is nonobvious under 35 U.S.C. §103, is also a mixed conclusion of fact and law. Therefore, the appropriate standard of review of this conclusion, were it reviewed under the APA, would be whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Any lesser standard of review of the PTO's decision would be inconsistent with the purposes and language of the APA.

A. The Jury's Decision Was Equivalent to an Administrative Review of the PTO's Decision.

Not every patent lawsuit requiring a jury review of a patent will necessarily result in the kind of administrative review envisioned by the APA. Instead, this will occur only in cases having the following two characteristics, both of which are present here:

> 1. The pertinent prior art evidence on which the challenger's anticipation and obviousness defenses are based was examined by the PTO.
>
> 2. The patentee committed no inequitable conduct by misleading the PTO regarding the invention or the pertinent prior art.

The discussion below demonstrates that each of these characteristics is present in this case.

1. The PTO Reviewed the Challenger's Pertinent Prior Art.

At trial, Manildra claimed that the inventions of the two patents in issue (the "Patents") were anticipated under 35 U.S.C. §102 or rendered obvious under 35 U.S.C. §103 by the following items of prior art:

1. U.S. Patent No. 2,642,185 (the "Fontein Patent");
2. British Patent No. 1,252,858 (the "NCR Patent"); and
3. The work of Dr. William Yamazaki in 1963 and 1964.

Appendix to Manildra's Petition for Writ of Certiorari ("Man. App.") 6a-7a, 37a-42a. Each of these three items of prior art was referred to in the application which led to the issuance of the Patents and was reviewed by the Patent examiners. *Id.*

Other items of evidence cited by Manildra did not rise to the level of pertinent prior art which could invalidate a patent. The trial court mentioned only one such item in its decision denying OMI's motion for JMOL on the patent issues. Man. App. at 38a. This item was a second article by Dr. Yamazaki, Tr. Ex. 1344, discussing the same experiment he had described in his earlier article, Tr. Ex. 1053 p. 113, which the PTO examiners had reviewed.

The second Yamazaki article is not legally more pertinent, however, than his first article for purposes of an anticipation or obviousness analysis. In fact, Manildra's patent expert, John Howell, testified that the second article was at most somewhat more detailed than the first. Appendix to Cross-Petition for Writ of Certiorari ("Cross-Pet. App.") at 4a. In addition, Howell testified that the second article is incomplete and does not enable a person of ordinary skill in the art to reproduce the experiment. Cross-Pet. App. at 4a-5a. Manildra essentially acknowledged this by offering live testimony by Dr. Yamazaki to "elaborate" on his articles and fill in the gaps in their disclosure with materials never made public before the trial in this matter. Cross-Pet. App. at 2a-3a.

Most importantly, Manildra contended that the second Yamazaki article, like the first, anticipated or rendered obvious *only* Claims 24 through 27 of Patent No.

3,901,725. Cross-Pet. App. at 6a. All of the remaining claims in issue (independent Claims 1, 8, and 16 of Patent No. 3,901,725, independent Claims 1, 6, 8, and 11 of Patent No. 4,280,718, and additional claims dependent on them) are, according to Manildra, totally unaffected as to anticipation or obviousness by either of Dr. Yamazaki's articles.

As a result, the PTO reviewed all of the same pertinent prior art that the jury reviewed.

2. The Jury Found that No Inequitable Conduct Occurred.

The jury's verdict specifically found that no inequitable conduct had occurred in the procurement of the Patents. Man. App. at 4a. Manildra did not challenge these findings by a motion for judgment as a matter of law, either before or after the verdict, and it did not challenge the findings on appeal. Therefore, these findings are conclusive. They confirmed that there was no irregularity in the administrative proceedings before the PTO which led to the issuance of the Patents. Specifically, they confirmed that the PTO was not misled regarding the inventions or the prior art.

B. The Jury's Standard of Review Was More Hostile to the PTO's Decision Than the APA Permits.

The district court and the Federal Circuit permitted the jury to overturn the PTO's administrative decision to

issue the Patents so long as there was "substantial evidence" to support the jury's contrary conclusion that the inventions were obvious. This is a violation of federal statutory law in two ways: (1) every determination of obviousness requires clear and convincing evidence, not merely substantial evidence, and (2) in this special administrative-review situation, as shown above, an obviousness determination must incorporate the APA's standards of administrative review.

The patent statutes create the presumption that all Patents are valid. 35 U.S.C. §282. To enforce this presumption, the Court has required a challenger to provide clear and convincing evidence supporting its claimed grounds for invalidity. *Radio Corp. v. Radio Engineering Laboratories, Inc.*, 293 U.S. 1 (1934); *Tol-O-Matic, Inc. v. Proma Produkt-und Marketing Gesellschaft m.b.H.*, 945 F.2d 1546, 1552-54 (Fed. Cir. 1991). The Federal Circuit's opinion in this case, however, never mentioned this clear and convincing evidence standard. Instead, it upheld the jury's finding of invalidity based merely on routine "substantial evidence", which it referred to as "more than a 'mere scintilla' ". Man. App. at 5a-8a. This alone would render the Federal Circuit's decision invalid and subject to reversal.

In addition, however, since this case involved direct jury review of the PTO's administrative decision based on the same evidentiary record, the required standard of review should have been even more stringent. In order to incorporate the standards of the APA, the jury's verdict should have been upheld only if Manildra had presented clear and convincing evidence that the PTO's decision

was arbitrary, capricious, an abuse of discretion, or not in accordance with law.

The Federal Circuit has recognized in the past that greater deference is due to the PTO's decision where the record before the jury is essentially the same as the administrative record before the PTO. *Hewlett-Packard Co. v. Bausch and Lomb, Inc.*, 909 F.2d 1464 (Fed. Cir. 1990) (where pertinent prior art was disclosed to PTO, challenger's burden is "especially difficult"). In *American Hoist & Derrick Co. v. Sowa and Sons, Inc.*, 725 F.2d 1350, 1359 (Fed. Cir. 1984), the Federal Circuit held:

> When no prior art other than that which was considered by the PTO examiner is relied upon by the attacker, it has the added burden of overcoming the deference that is due to a qualified agency presumed to have properly done its job, which includes one or more examiners who are assumed to have some expertise in interpreting the references and to be familiar from their work with the level of skill in the art and whose duty it is to issue only valid patents.

American Hoist found the source of this deference in the court's decision in *Morgan v. Daniels, supra. See also, Neff Instrument Corp. v. Cohu Electronics, Inc.*, 298 F.2d 82, 86-87 (9th Cir. 1961) (presumption of validity is "based upon the expertness of the Patent Office" and it "becomes all the stronger when the Patent Office has considered the most pertinent references before issuing the patent").

However, the Federal Circuit failed to apply this heightened standard of scrutiny to the jury's decision in this case. Instead, the Federal Circuit failed even to require clear and convincing evidence of obviousness.

This violated two of this Court's precedents. First, it violated the rule of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), which requires a court ruling on a motion for JMOL to take into account the non-movant's burden of proof, especially where that burden requires clear and convincing evidence. Second, it violated the rule in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), which establishes the supremacy of the deferential administrative review standards contained in the APA. Because it is contrary to both of these precedents, the Federal Circuit's decision should be reviewed by the grant of a writ of certiorari.

II. THE FEDERAL CIRCUIT IGNORED UNCONTESTED EVIDENCE OF INFRINGEMENT, CONTRARY TO THE COURT'S PRECEDENT.

The Patent laws prohibit all infringement, without establishing a threshold level. Infringement is defined broadly in 35 U.S.C. §271(a), which states that "whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent." The Court held as long ago as 1874 that even a slight amount of infringement is still infringement and violates the statute. In *The Wood-Paper Patent*, 90 U.S. (23 Wall.) 566, 607 (1874), the Court stated:

> If there has been any infringement it was very slight . . . This may have been, and it probably was, only occasionally, but it was, nevertheless, an invasion of the monopoly.

The Federal Circuit and its predecessors have generally followed this rule, by narrowly construing the judicially created experimental-use exception and resisting other efforts to establish exceptions to the statutory prohibition of infringement. In *Roche Products, Inc. v. Bolar Pharmaceutical Co.*, 733 F.2d 858, 862-63 (Fed. Cir.), *cert. denied*, 469 U.S. 856 (1984), the Federal Circuit held that it is a misnomer to call infringement *de minimis* when it has definite, cognizable, and not insubstantial commercial purposes and held that such infringement violates the patentee's rights "even if the quantity used is small." In *Neff Instrument Corp. v. Cohu Electronics, Inc.*, 269 F.2d 668, 672-73 (9th Cir. 1959), the Ninth Circuit reviewed prior decisions issued by itself and the Second, Sixth, and Seventh Circuits holding that the manufacture or sale of one infringing machine creates liability, and it reversed the district court's summary judgment order which had excused a single undisputed infringing sale as *de minimis* activity.

The Federal Circuit ignored these precedents in this case, however, by permitting Manildra to escape liability even though there was uncontested evidence from Manildra's own records that it had made and sold thousands of pounds of infringing product. Manildra acknowledged that its products satisfied all of the elements of the claims in issue except the numerical limitations. Cross-Pet. App. at 1a. These numerical limitations called for wheat starch with "about 22%" of its particles by population above 22 microns and "about 99%" by volume above 12 microns. Cross-Pet. App. at 8a. Manildra's own expert, George Frost, acknowledged that, using Manildra's measurements of its own production

runs of the accused product, called M-80, ten of Manildra's 2400-pound production pallets literally infringed the first of these numerical limitations, and five of those pallets infringed both of the numerical limitations. Cross-Pet. App. at 7a.

Evidence was also presented at trial that many batches of Manildra's product did not infringe, and Manildra claimed that this demonstrated that its infringing products were statistically insignificant "outliers". However, these other noninfringing batches do not contradict the fact that several 2400-pound batches did infringe. The Federal Circuit erred in ignoring the uncontested evidence of literally infringing products, as revealed in the following statement from its opinion:

> Moreover, although M-80 data were presented at trial that would have supported the finding of infringement of the claims' granule size and quanta limitations, there was also more than substantial evidence for the jury to have concluded otherwise, as it did.

Man. App. at 10a.

In other words, the Federal Circuit permitted the jury to "weigh" the uncontroverted evidence of literally infringing pallets against the evidence of other, noninfringing pallets. This ruling allowed the jury's finding of no infringement to stand so long as the jury found that the uncontested infringement was "outweighed" by evidence of separate non-infringement. The Federal Circuit's ruling is directly contrary to the Court's precedent in *The Wood-Paper Patent*, and the Court should grant certiorari to correct this error.

III. CONCLUSION

The Federal Circuit permitted the jury essentially to reverse the PTO's decision regarding patentability, after reviewing the same pertinent prior art, but without requiring the jury to show the deference mandated both by the Court's decisions and by Congress. The Federal Circuit also failed even to review the evidence under the clear and convincing standard required by the Court's and its own precedents. The Court should grant certiorari to re-establish the appropriate standard of review.

The Federal Circuit also condoned the jury's ignoring Manildra's substantial uncontested infringment on the ground that there was also some evidence of noninfringing products. The Federal Circuit's error violated the Court's interpretation of the patent statute defining infringement, which held that this statute does not excuse slight infringement. Certiorari is appropriate to reaffirm this precedent as well.

Respectfully submitted,

Byron L. Gregory
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000

Of Counsel:

Roger W. Wenthe
Mark Lee Hogge
Patrick McAnany

APPENDIX

[E. Johnson Tr. 550]

Q. This is – this is part of the separation process in order to get the M-80 product. Is that right?

A. It all is, yes.

Q. And that then produces the A Starch. Is that right?

A. Yes.

Q. And is the A Starch a native colloid slurry?

A. Yes.

Q. Substantially free of fiber and soluble protein and other nonstarch material?

A. Basically.

Q. Now, the – these hydrocyclones that were acquired from Pillsbury, these are Dorr-Oliver hydrocyclones?

A. Yes.

Q. And these Dorr-Oliver hydrocyclones can perform both a washing function and a classifying function, can they not?

A. Yes.

Q. And they can do either depending upon adjustments. Isn't that right?

A. Yes

Q. And so the hydrocyclones in the Minneapolis facility of Manildra can perform the function

* * *

[Yamazaki Tr. 4004]

Q. Why don't you look at 13 – Trial Exhibit 1344, sir, and turn to Page 74.

A. 74?

Q. Yes.

MR. GREGORY: Thank you, Mark.

Q. Okay, sir. I think you just testified that the – for the first pass you – excuse me, to achieve the first cut you went through 8 passes, to achieve the second cut you went through 4, and to achieve the third cut you went through 2 passes?

A. That's correct.

Q. Now, in your report, Trial Exhibit 1344, at Page 74, you see in the third full paragraph it says, In all separations by air classification, multiple passes, paren (6 to 10) paren, were required to obtain the desired purities of the fractions. Do you see that?

A. Yes, I do.

Q. Now, that certainly states that for each separation you had to use at least 6 passes?

A. Well, when we say all separations, we are referring to separations by the air classifier or both the large granule starch and the small granule starch. Because the small granule

[Yamazaki Tr. 4005]

starch was one of the products that we were obtaining.

Q. So in the first cut you're saying you – the – the prime starch went through the air classifier eight times?

A. Yes

Q. So that there were no less than 14 passes in order to get S-6208?

A. That's correct.

Q. You operated the entire experiment off of a bench model air classifier. Is that right?

A. This was the research model which we showed a photograph of during the testimony.

Q. Now, where in your work that is described as Trial Exhibit 1344 do you describe the model type of – of research bench model? Do you understand my question, sir? Do you understand my question?

A. Yes, I think I do.

Q. I'm asking you about the model number. Where in your –

A. There is no mention of the model number as such.

Q. Okay, sir. You mean at all? There is no motions [sic] of the model number at all?

* * *

[Howell Tr. 6707]

A. Yes.

Q. Okay

A. Yeah, under those sets of facts, the answer would be, I'm not aware of any case like that.

Q. Okay, sir. Let's talk about the other prior art where we talked about what – what was before the Patent

Office in the way of Yamazaki 2, and did you complete your answer as to what was missing that the Examiner did not see because he did not have Yamazaki 2 in front of him?

A. Well, I mentioned the size requirements of the claims, 22 percent and the 99 percent.

Q. Yes.

A. And I think in general, the Yamazaki 2 reference is more detailed and specific than the Yamazaki 1 reference. Both in how the prime starch is produced, and I also think it's somewhat clear and more detailed on the air classification and the results that he achieved using air classification.

Q. But we have gone through some of the information that it is not even included in Yamazaki 2 with respect to the process, no flow rate, for example. Is that right?

[Howell Tr. 6708]

A. Right.

Q. No reference to baume. Is that right?

A. Yes, we've talked about that.

Q. No understanding as to how the centrifuge worked. You said you wouldn't know that, but maybe someone of ordinary skill in the art might understand how the centrifuge was working?

A. Yes, I would think they would. I don't happen to know. I'm not an expert on centrifuges.

Q. Right. And one would have to know all that to enable himself or herself to duplicate that. Right?

A. One would have to know enough that – in – in reviewing Doctor Yamazaki's work that they could reproduce the results of that work, yes.

Q. Now, if there is no sub-sieve analysis in Doctor Yamazaki's work, is it fair to say that the Yamazaki 2 does not anticipate claims 24 to 28?

A. No. Because the patent tells you what sub-sieve is, which is an average – average particle size. So any prior art that would meet that limitation would anticipate those claims.

* * *

[Manildra Appeal Brief at 7]

22%/22 micron number limitation. The patent claims also require that the LGWS product have 22% of the particles, measured by *number*, or at least 22 microns in diameter. Again, the claims use different modifiers for the 22% limitation: "at least" (*e.g.*, P902, claim 24) and "at least about" (*e.g.*, P510, claim 1).

Sub-sieve limitation. Certain claims contain size limits based upon "sub-sieve value," which the patents define as corresponding to "average particle size." P902, col. 12, ln.15, 25; P510, col. 11, ln. 50, 60-1. Those claims require various sub-sieve values, *e.g.*, "substantially higher than 10.8 microns," "higher than 10.8 microns" and "in the range from 19.1 microns to about 20.8 microns." P902, claims 16, 15; P510 claim 14.

II Prior Art

During the application process, the Patent Office was not made aware of the critical prior art and information.

A. Yamazaki's 1963 air-classified LGWS

In 1963 and 1964, Dr. William Yamazaki, research director for the U.S. Department of Agriculture Soft Wheat Quality Laboratory in Wooster, Ohio, fractionated wheat starch, using a laboratory-scale Pillsbury air classifier. F3899 (Yamazaki). His LGWS met every limitation of claims 24-27 of the '725 patent, which do not refer to any process. F3973-5. Yamazaki presented his work to the public conference in 1964, attended by representatives of leading starch producers and users, and he described it in a paper published and available in the Ohio State University library. P1344, F3900-3.

[OMI Petition for Rhg. at 7]

Table 1
M-80 Literally Infringing the Requirement of
About 22% By Population Greater Than 22 Microns

Percentage Greater Than 22 Microns	Trial Exhibit	Testimony of George Frost
21.4	P2899/2-3*	"not far from it" F2101*
21.4	P2977/2-3*	
21.4	P2913/2-3*	"I'd carefully consider it" F2096*
21.9	P2903/1-2 (P2877)	"I certainly would not say out of hand it isn't" F2084-5*
22.9	P2911/2-3*	
23.1	P2902/1-2	"comes within the number" F2087*
23.4	P2970/2-4*	
23.5	P2904/1-2* (P2883*)	"does" meet the parameter F2105*
24.9	P3008/2-4*	
25.0	P2898/2-3	

Table 2
M-80 Literally Infringing the Requirement of
About 99% By Weight Greater Than 12 Microns

Percentage Greater Than 12 Microns	Trial Exhibit	Testimony of George Frost
98.1	P2979/1*	
98.1	P2981/1*	
98.1	P2898/1	
98.1	P2883*	
98.2	P2908/1*	"very much on the edge" F2089*
98.3	P2914/1*	"close enough so I certainly would consider it pretty carefully" F2097*
98.4	P2970/1*	
98.5	P2899/1*	"rather close . . . I might well consider that's about 99" F2101*
98.5	P2980/1*	
98.8	P2915/1	"effectively 99" F2102*
98.8	P2975/1*	
98.8	P2877/1	
98.9	P2973/1*	

[U.S. Patent 3,901,725, Claim 1]

1. A large granule cereal starch product obtained by wet process separation from a native colloid slurry of bimodal granule starch selected from the group of wheat, barley and rye starches, at least about 22% of the total number of granules of said large granule cereal starch being at least 22 microns in size, about 99% by weight of the granules are at least 12 microns in size, said starch being substantially free of other matter, and having been obtained by hydrocyclone separation directly from native colloid starch slurry from which substantially all of the gluten, fiber and other matter have been removed.

[U.S. Patent 4,280,718, Claim 1]

1. In a surface coated with rupturable micro-capsules, a plurality of protective particles to prevent premature rupturing of the micro-capsules during handling, said protective particles having been obtained by wet separation of the large granules from a bimodal cereal starch selected from the group consisting of wheat, barley and rye which starch normally has a bimodal particle size distribution, said protective particles consisting essentially of large cereal starch granules in which 99% by weight of the granules range in size from 12-40 microns, and in which at least about 22% of the total number of said separated large cereal starch granules are at least 22 microns in size.